

COMPLIANCE BOARD OPINION NO. 02-12

October 17, 2002

Mr. William H. Russell

The Open Meetings Compliance Board has considered your complaint alleging that, on August 14, 2002, the Frostburg City Council violated the Open Meetings Act. In analyzing your complaint, we have considered, first, whether the Act applied to the portion of the meeting in question. We conclude that it did. Second, we considered whether the discussion exceeded the bounds of the “specific personnel matter” exception, which was cited by the Council as the basis for closing the meeting. We find that, because the Council did not confine its discussions to personnel matters involving specifically identifiable individuals, the Council violated the Act.

I

Complaint and Response

The essence of your complaint is that the Frostburg City Council violated the Open Meetings Act on August 14, 2002, when the Council conducted a closed meeting under the premise that discussions involved personnel matters, when in fact discussions involved the administrative structure of City government. In support of the allegations, your complaint noted that, at the Council’s regular monthly meeting the following day, the Mayor announced that municipal departments would be under the purview of the City Administrator on a trial basis, for a period of six months to one year. Traditionally, City departments have been under the purview of individual Council members, each of whom was elected to oversee a specific area of City government.¹ The complaint concluded that such a change should have been

¹ As explained in the Council’s response, §807 of the Frostburg City Charter provides for the election of Council members to serve in the following capacities: Commissioner of Public Safety, Commissioner of Public Works, Commissioner of Finance, and Commissioner of Water, Parks and Recreation.

“discussed before the public with public input.”² Consequently, the Council’s discussion of it in closed session violated the Open Meetings Act.

In a timely response on behalf of the Council, Jeffrey S. Getty, Esquire, offered a contrary view. According to Mr. Getty’s response, the purpose of the August 14 meeting was to discuss “specifically identifiable employees of the City government and how they would be impacted by a proposed reorganization of the internal operation of the municipal government.” This reorganization, according to the Council’s response, will result from a charter amendment adopted during December, 2001, addressing the role of the City Administrator.³

The minutes provided by the Council indicate that the August 14 meeting was closed by a unanimous vote “to discuss personnel matters that affect one or more specific individuals” In its response, the Council elaborated that the purpose of the meeting was “to consider a revised organization of the municipal government to make it clear that the City Administrator was the reporting point for department heads and not the various Commissioners.” Closing the meeting, the Council indicated, was intended to allow for “a full free and frank exchange of views on the management capabilities of specifically identified individuals.” The Council further noted that decisions made during the August 14 meeting were reported to the public at the regularly scheduled Council meeting held the following day.

The response went on to argue that the Council was engaged in an executive function during this portion of the August 14 meeting and, therefore, the Open Meetings Act did not apply. *See* §10-503(a)(1)(i). The Council argued that it was carrying out its administrative responsibilities in accordance with the Charter – matters that, in the parlance of the Open Meetings Act, constitute an “executive function” to which the Act does not apply.

The response concluded that, in keeping with the Council’s “commitment for full public participation in the affairs of local government,” the Council plans to address the organizational changes considered in the closed session on August 14

² Although the City Charter or other law might grant the public the right to provide testimony in connection with certain matters, the Open Meetings Act does not do so. Rather, it simply grants the public the right to attend and observe any meeting that is required by the Act to be open. §10-507(a). This and other statutory references, unless otherwise noted, are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

³ By way of background, the Council’s response set out the applicable charter provisions, noting that when §801, captioned “City Administrator,” was amended, there was no corresponding change to §807, addressing the duties of each Council member.

at its next public meeting, at which members of the public will have an opportunity both to observe these discussions and to make their views known.

II

Applicability of the Act

A. After-the-Fact Assertion of Executive Function Exclusion

At the time, the City Council apparently thought that the Open Meetings Act applied to the August 14 closed session, for it followed the Act's procedures and invoked one of its exceptions, §10-508(a)(1), as its basis for closing the meeting. In its response to the complaint, however, the Council contended that the meeting was outside the Open Meetings Act, in that the Council was engaged in an executive function under the City Charter.

We have consistently held that a public body, in response to a complaint, may not argue that an exception justified a closed meeting if it failed at the time of the meeting to invoke that exception. *See, e.g.,* Compliance Board Opinion 94-5 (July 29, 1994), *reprinted in* 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 73, 78. However, we cannot take the same approach when a public body responds to a complaint by contending that it was in fact engaged in an executive function. If a meeting did concern an executive function, the entire Act would be inapplicable. Consequently, as a matter of discerning our own jurisdiction, we must consider that possibility whenever it is raised by a public body.

B. No Executive Function Exclusion in this Case

As we have repeatedly explained, consideration of the executive function involves a two-step analysis. Because of the Act's definition of "executive function," a discussion that constitutes an advisory, judicial, legislative, quasi-judicial, or quasi-legislative function under the Act may not be considered an "executive function." §10-502(d)(2). The converse does not necessarily follow, however; discussions outside these alternative functions might or might not be executive functions, depending on whether the discussion fits the central definition of an executive function – in this case, whether it involves "the administration of ... a law of [the] political subdivision." §10-502(d)(1)(ii). *See, e.g.,* Compliance Board Opinion 01-11, *slip op.* at 4. The discussion must involve a matter that is "administrative in character," rather than one involving formation of policy, in order to qualify as an executive function. Stated otherwise, the second aspect of the analysis requires that we consider whether the discussion concerned the application of a law or policy currently in place or the development of new policy. Only the former may qualify as an executive function. *Id.* at 4-5.

The Council refers us to §801 of the Frostburg City Charter, as amended December 2001:

The Council shall appoint a City Administrator whose compensation shall be set by the Council. The City Administrator shall work under the general direction of the Council and be responsible for the day to day operations of the City and carry out the policies determined and approved by the Council. The City Administrator shall exercise general supervision over City employees, the heads of all departments, agencies, and offices of the City and shall report directly to the Council. The City Administrator shall perform such other duties as may be prescribed by this Charter or be required by the Council not inconsistent with this Charter.

In the Council's view, they "were acting to administer a change in the Charter which had already been approved." More specifically, the Council was addressing how the Council members, elected to oversee specific areas of City government, "would discharge their supervisory duties" in light of the charter amendment.

Whether to characterize a discussion as the administration of existing law or the formulation of new policy is sometimes debatable. One might argue, as the Council has suggested, that it was simply administering existing law in discussing implementation of the 2001 Charter amendment. However, as we recently explained, if every discussion of how a public body should implement a broad statutory mandate – or, in this case, a charter provision – were permissibly deemed an executive function, that construction "would subvert the policies of the Open Meetings Act, since every action of a local government can be traced back to some source of authority." Compliance Board Opinion 02-3 (May 10, 2002), slip op. at 4-5. *See also* Compliance Board Opinion 01-7 (May 8, 2001), slip op. at 9.

In our view, the topics of discussions on August 14 transcended the limits of the executive function exclusion. The Council's consideration of alternative scenarios that would define the relationship between the Council and City Administrator were policy deliberations fundamental to the City's governance, rather than simply putting into place the details of a policy already reflected in current law. The charter amendment was not so specific as to preclude the Council from exercising discretion in determining policies under which it would be implemented.

The consideration of any matter to set policy is a legislative function under the Act,⁴ and thus cannot be considered an executive function. §10-502(d)(2)(ii).

III

Personnel Exception

The Open Meetings Act allows a public body to close a meeting to discuss “the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials over whom it has jurisdiction.” It may also discuss in closed session “any other personnel matter that affects 1 or more specific individuals.” §10-508(a)(1). However, like all of the listed exceptions, the personnel exception must be “strictly construed in favor of open meetings.” §10-508(c); Compliance Board Opinion 94-5, at 76. Thus, in relying on the personnel exception as the basis for a closed meeting, a public body must use care to avoid discussion of general personnel issues beyond the discussion concerning identifiable individuals. *Id.*

Given its concerns over the management capabilities of identifiable individuals, the Council was justified in invoking this exception to close the August 14 meeting. The Council, however, manifestly did not limit its discussions to the performance of identifiable individuals. The minutes of the meeting indicate that discussions included changing the reporting structure within the government, the merits of a commission versus strong mayor form of government, the use of a complaint log by City staff, and active City projects of interest to the Council. None of these topics could justifiably be discussed under the personnel exception. Nor can discussion of such general topics be immunized from public observation merely because one or another participant might mention specific people in the course of a discussion. There is no apparent reason to believe that discussions concerning particular individuals were so intertwined with all aspects of these matters as to make open-session discussion of the broader topics impossible. It is inconceivable, for example, that the *only* considerations in choosing between a commission or a strong mayor form of government relate to the performance of a few people who happen to work for the City now. The Council’s failure to limit its discussion to the performance or other specific employment matters of identifiable individuals violated the Act.

⁴ The Act defines “legislative function” in part as “the process or act of ... approving, disapproving, enacting, amending, or repealing a law *or other matter to set public policy* ...” §10-502(f)(1) (emphasis supplied).

IV

Other Matters Discussed at Meeting

In its response, the City Council noted that “a number of issues were discussed [at the August 14 closed session] which are not the subject of Mr. Russell’s complaint,” including scheduling of future meetings and “discussions of work sessions.” The Council candidly acknowledged that “these discussions were not properly matters to be conducted in a closed session as they do not pertain to personnel matters as stated in the motion to go into closed session.” Nor, apparently, are they asserted to fall within the executive function exclusion. The Council indicated that these discussions evolved “based upon the convenience of having everyone present.”

We are disinclined to find a violation based on matters beyond the scope of the complaint, voluntarily disclosed by the Council, and described only summarily. Nevertheless, for the benefit of the Council and all other public bodies, we point out that ignoring the constraints of the Open Meetings Act by enjoying “the convenience of having everyone present” is a temptation that must be resisted. Of course it is convenient to plan ahead when all are present. But convenience is not the higher value here. Preserving the public’s right to observe their government is. Thus, the limitations imposed by the Act must be kept in mind *especially* when convenience and efficiency pull a public body toward improper discussion.

V

Conclusion

The Frostburg City Council exceeded the limits of what might constitute an executive function at its meeting on August 14 when it explored the relationship between Council members and the City Administrator under the December 2001 charter amendment and overall issues of City government structure. Thus, the meeting was subject to the Open Meetings Act. In closing the meeting to the public, the Council properly relied on §10-508(a)(1) for its discussion of personnel matters affecting identifiable individuals. By not limiting its deliberations to matters encompassed by the exception, however, the Council violated the Act.

OPEN MEETINGS COMPLIANCE BOARD

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